

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OUR MONEY OUR TRANSIT and ROBERT  
MACHERIONE,

Plaintiffs,

v.

FEDERAL TRANSIT ADMINISTRATION;  
PETER M. ROGOFF, in his official capacity as  
Administrator, Federal Transit Administration;  
and RICHARD F. KROCHALIS, in his official  
capacity as Regional Administrator, Federal  
Transit Administration Region X Office,

Defendants,

LANE TRANSIT DISTRICT,

Defendant Intervenor.

Case No. 2:13-cv-01004-TSZ

DEFENDANT INTERVENOR LANE  
TRANSIT DISTRICT'S OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND CROSS  
MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

NOTED ON MOTION CALENDAR:  
April 25, 2014

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Pursuant to Fed. R. Civ. P. 56 Intervenor respectfully files this Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment.

### I. INTRODUCTION

Plaintiffs ask this Court to set aside the results of over six years of exhaustive planning for a much needed public transit service. This process included hundreds of community meetings and thousands of public comments -- resulting in significant project modifications after consideration of scores of alternatives. Each alternative was carefully and publicly vetted under various criteria before the environmentally preferable alternative was identified. Plaintiffs, a taxpayer group and its spokesperson, seek to stop the project. They oppose the spending of tax money on the project, not the environmental implications of it. However, their taxpayer agenda does not afford them standing under the National Environmental Policy Act ("NEPA") -- they cannot stumble into NEPA's zone of interests. Moreover, the procedural requirements of NEPA do not mandate that the agencies choose Plaintiffs' preferred alternative or require any greater level of analysis than was already performed over the past six years.

### II. BACKGROUND

#### A. West Eugene EmX Extension ("WEEE")

In 2007, the Eugene City Council and the Lane Transit District ("LTD") Board of Directors identified a need for public transit service along an 8.8-mile stretch of the West 11<sup>th</sup> Avenue Corridor -- the primary east/west transit corridor linking the west side of Eugene to downtown. (AR118825). To serve this need, LTD, the county transit agency providing daily bus service to nearly 300,000 residents, proposed the West Eugene EmX Extension ("WEEE") -- a new line of the Emerald Express ("EmX") Bus Rapid Transit service that would run from the main downtown Eugene Station through the West 11<sup>th</sup> Avenue Corridor. (AR118847). The fleet of hybrid busses used on the EmX have been recognized nationally as sustainable public transportation. (AR7309). The busses run on dedicated lanes that allow them to bypass traffic

1 and operate more efficiently for riders and the environment. (*Id.*) The WEEE will also improve  
 2 several intersections, and bicycle lanes and pedestrian crossings along the Corridor. (AR118045).

3 Between 2007 and 2013, in anticipation of seeking funding for the WEEE under the  
 4 FTA's New Starts program, LTD identified and evaluated various alternatives to serve the need  
 5 along the West 11<sup>th</sup> Avenue Corridor. (AR117951). The study examined a broad range of bus  
 6 and bus rapid transit alternatives to link the residential and commercial activity centers along the  
 7 corridor with the region's main business districts -- Eugene and Springfield -- and the region's  
 8 largest employers, the University of Oregon and Peace Health Hospital. (AR118825). At every  
 9 stage, LTD facilitated the review of project information and incorporated feedback from the  
 10 communities' diverse stakeholder groups. (AR118841-42). LTD also "coordinated with local,  
 11 state and federal agencies regarding the conceptual designs and evaluations of those designs."  
 12 (AR115274). Ultimately, the five-year study produced a record more than 130,000 pages long.

13 As a preliminary step in the process, LTD drafted a Purpose and Need Statement based  
 14 on previous planning work and input from the public. (AR118848). LTD published a Notice of  
 15 Intent to conduct an environmental review of the WEEE, and began conducting workshops with  
 16 local, state and federal agencies and open houses with the public. (*Id.*) In the fall of 2007, LTD  
 17 established the WEEE Corridor Committee -- comprised of representatives from various  
 18 agencies, businesses, neighborhoods and other interested groups. (*Id.*) The Committee refined  
 19 the Statement based on public and agency feedback and the LTD Board adopted the final  
 20 Purpose and Need Statement on March 19, 2008, (*Id.*),<sup>1</sup> which states in part:

22 The purpose of the proposed WEEE project is to implement high-capacity public  
 23 transportation service, in the West 11<sup>th</sup> Corridor (east/west), utilizing the adopted  
 24 high-capacity transit mode identified in the Regional Transportation Plan, that is  
 less hindered by congestion and that provides efficient, effective, dependable, and  
 visually appealing service throughout the life of the project.

25 (AR118850). The Statement also detailed the need for the project based on historic and projected  
 26 increases in traffic congestion along the corridor and the resulting deteriorating reliability of

27 <sup>1</sup> LTD and the WEEE Corridor Committee considered 396 comments on the proposed Statement. (AR115265).

1 public transportation there and the local and regional land use and development plans, among  
 2 others. (AR118850-51). Based on the Statement, LTD established eight criteria by which to  
 3 compare alternatives and to evaluate their effectiveness: 1) improve reliability of service; 2)  
 4 improve efficiency of service to maximize scarce resources; 3) support local development  
 5 consistent with adopted community plans; 4) accommodate future growth; 5) consider needs of  
 6 pedestrians, bicyclists, and motorists; 6) provide fiscally stable public transportation; 7) protect  
 7 resources in the natural and built environment; and 8) support LTD's sustainability policy and  
 8 the City's efforts to reduce greenhouse gas emissions. (AR118851-52).

9 Using these criteria, over the next two years, LTD evaluated and eliminated dozens of  
 10 alternatives. A large part of this process occurred at design workshops, and other public outreach  
 11 events. (AR118860). FTA and LTD also consulted with the U.S. Army Corps of Engineers, the  
 12 Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Oregon Department of  
 13 State Lands to assess the project's potential effects on protected species and wetlands and to  
 14 modify the WEEE to minimize its effects on sensitive resources. (AR115156).

15 By early 2010, LTD had identified 58 alternatives for further evaluation through  
 16 technical impact studies: the No-Build, or no action alternative; the Transportation System  
 17 Management ("TSM"), or low-cost capital improvements alternative; and three bus rapid transit  
 19 ("BRT")<sup>2</sup> alternatives with 56 unique routing combinations. (AR118831). The three BRT  
 20 alternative alignments were (1) West 13<sup>th</sup> Avenue-West 11th Avenue; (2) West 6<sup>th</sup>/7<sup>th</sup> Avenues-  
 21 West 11<sup>th</sup> Avenue; and (3) West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 7<sup>th</sup> Place. (AR117955).

22 By June 2010, based upon the findings of technical impact studies,<sup>3</sup> LTD staff  
 23 recommendations, public input, and advice from the Eugene City Council and other public  
 24

25 <sup>2</sup>BRT was adopted as the preferred strategy for the Eugene-Springfield metropolitan area following an extensive  
 26 Major Investment Study and subsequent Regional Transportation Plan, adopted in 2001 (AR117960).

27 <sup>3</sup>Between June and September 2010, LTD commissioned more than twenty technical studies to evaluate the impact  
 of the WEEE on various biological, ecological and geological resources, land use, public spaces, and historic,  
 archaeological and cultural resources, among others. (AR119175-78).



bodies, the LTD Board eliminated 46 of those BRT routing combinations.<sup>4</sup> (AR118864). Thirty-two of the BRT routing combinations were eliminated because of their potential to have significant adverse impacts on protected species, critical habitat, sensitive areas and wetlands, parklands, the multiuse trail, and cultural resources. (*Id.*)<sup>5</sup> Another fourteen BRT options were eliminated after the studies revealed that the high ratio of capital costs to projected ridership would not address the city's public transit needs. (*Id.*)

Thereafter, the No-Build, TSM alternative and the remaining 10 BRT alignment alternatives were advanced for further consideration in a detailed Alternatives Analysis ("AA"). (AR118865). The LTD Board advanced those ten BRT alternatives finding that the two along West 13<sup>th</sup> Avenue-West 11<sup>th</sup> Avenue would "[t]end to have less likelihood to impact parklands and open spaces," the four along West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 11<sup>th</sup> Avenue would "[a]void potential for impact to environmentally-sensitive natural resources," and the four along West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 7<sup>th</sup> Place would "serve a relatively high number of acres of vacant and redevelopable land." (AR118458). As it did consistently throughout the study, LTD used the eight criteria of effectiveness discussed above, to weigh the benefits and impacts of each alternative, including engineering and cost (AR118084-109), travel demand (AR118062-82), transportation and parking impacts (AR118110-164), and various environmental factors. (AR118166-290). LTD consulted with the FTA at every step in the AA process. (AR115156-57).

The Draft AA Report concluded that the West 13<sup>th</sup> Avenue-West 11<sup>th</sup> Avenue alignment alternative performed best from a technical perspective and preliminarily recommended it as the Locally Preferred Alternative ("LPA") for the WEEE. (AR118343). The determination was based on operating and cost efficiencies, higher safety and mobility, and better support of the BRT system plan. (AR118342). The West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 11<sup>th</sup> Avenue alternative ranked second as a result of higher projected number of property acquisitions and tree removals, and

<sup>4</sup> The alternatives were scored based on how effectively they met the project's objectives. The scores allowed for a comparison of the alternatives during the elimination process. (AR118442; AR118469-AR118473).

<sup>5</sup> Additionally, several of those routes were also found to negatively impact low income housing. (AR118864).

1 potential conflicts with the BRT System Plan. (AR118343). The West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 7<sup>th</sup>  
 2 Place alternative followed a distant third, and the No-Build and TSM options were identified as  
 3 the least effective alternatives. (*Id.*) The Draft AA was published in October 2010. (AR117981).  
 4 After the release of the Draft AA Report, LTD received hundreds of comments that led to  
 5 modifications and clarification of the AA. (*Id.*)

6 Contemporaneously with the release of the Draft AA, LTD convened a group of local  
 7 decision-makers to assist in the selection of the LPA.<sup>6</sup> (AR117983). The Joint Locally Preferred  
 8 Alternatives Committee was composed of the Eugene Mayor, two Eugene City Councilors, two  
 9 representatives from the Central Lane Metropolitan Policy Committee, and three representatives  
 10 from LTD. (AR117983). The Committee served as a conduit of information between LTD and  
 11 the decision-making bodies represented by its members. (*Id.*) The Committee and the project's  
 12 three decision-making bodies addressed technical and community issues with the alternatives  
 13 studied, including the preliminary LPA. (AR118868). LTD held two open houses and four public  
 14 hearings concerning the selection of the LPA, and a joint public hearing of the Eugene City  
 15 Council, the Metropolitan Policy Committee, and the LTD Board to take public testimony about  
 16 the preliminary recommendation of the West 13<sup>th</sup>-West 11<sup>th</sup> Avenue alternative as the LPA.  
 17 (AR117990-91). The Committee also worked with the project team to develop mitigation  
 18 measures addressing potential impacts to property, land uses, parking, driveways, and businesses  
 19 for the alternatives. (AR0118868). LTD logged 1,225 comments from the public and government  
 20 agencies on the WEEE and the selection of the LPA. (AR117992). It appropriately considered  
 21 the input received and incorporated suggestions. (AR115159).

22  
 23 As a result of the public comments on the Draft AA, and the public process led by the  
 24 Joint LPA Committee, of the 10 alternatives studied in the AA, the four West 6<sup>th</sup>/7<sup>th</sup> Avenues-  
 25 West 11<sup>th</sup> Avenue alternatives that required adding a lane were eliminated because of their

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26  
 27 <sup>6</sup> In addition to the Joint LTD Committee, four other committees contributed to the selection of the LPA. In all, these  
 committees held 24 meetings to review the Draft AA, and the information and public comments concerning the  
 WEEE and to develop recommendations. (AR117984-85).

1 potential impacts on abutting properties and the character of downtown Eugene. (AR118868).  
 2 The remaining two alternatives that would travel along West 7<sup>th</sup> Place were also eliminated  
 3 because there was not sufficient population or ridership projections along those routes, the routes  
 4 would have had an adverse impact on the trucking industry in the area, and there was no public  
 5 or agency support for the alternative. (*Id.*) The TSM Alternative was eliminated because of its  
 6 relatively high operating cost per trip and because the Committee determined it did not meet the  
 7 purpose of the project. (*Id.*) Ultimately, the three-decision making bodies represented in the  
 8 Committee voted to support a mitigated version of the West 6<sup>th</sup>/7<sup>th</sup> Avenue alternative instead of  
 9 the West 13<sup>th</sup>-West 11<sup>th</sup> Avenue alternative that had been preliminarily recommended as the LPA  
 10 in the Draft AA. (AR118732). The decision was based on the Committee's work and public  
 11 input on the Draft AA, as discussed above, and the decision-making bodies' determination that  
 12 the mitigated West 6<sup>th</sup>/7<sup>th</sup> Avenue alternative would better support the City's goals and needs,  
 13 including future development and employment.<sup>7</sup> (AR118764; AR118778-80; AR118795).

14 The mitigated West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 11<sup>th</sup> Avenue ("West 6<sup>th</sup>/7<sup>th</sup> Avenue") alternative  
 15 identified as the LPA was modified considerably during the public process that occurred after the  
 16 release of the Draft AA to:

- 17 • Avoid serious issues with wetlands, endangered species, and recreation/parklands  
 19 as a result of a revised path ending 2 miles east of the original terminus;
- 20 • Avoid the Amazon Creek and adjacent trail altogether, except for at one existing  
 21 roadway crossing and at two new multi-purpose path crossings;
- 22 • Avoid the need for street improvements that would impact several historic  
 23 properties along the corridor;
- 24 • Require significantly less property acquisition than anticipated in the original  
 25 LPA;
- 26 • Avoid adverse impacts to established residential neighborhoods; and
- 27 • Affect far fewer street and landscape tress than earlier iterations.

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27 <sup>7</sup> The LPA will contribute to the City's goals of reducing greenhouse gas emissions (AR119122), connect the region's highest-growth centers, and encourage development along major arterial corridors. (AR119126).

(AR118748).<sup>8</sup> These modifications further avoided and reduced potential impacts to the natural and built environment -- pushing the project well below the threshold of "significant" impacts that would require an Environmental Impact Statement ("EIS"). (AR118736-37). As a result, FTA determined that the project's environmental review under NEPA be accomplished with an Environmental Assessment ("EA"). (AR118748). This determination did not foreclose the possibility that an EIS may become necessary if the EA showed the project would have significant adverse impacts. (AR115157). The U.S. Army Corps of Engineers, the federal cooperating agency under NEPA, concurred with the FTA's decision. (AR118748).

The EA built on the results of the AA and evaluated the transportation benefits, environmental impacts, and financial implications on the natural and built environment of two alternatives: the No-Build alternative (*i.e.* no changes to the baseline) and the LPA. (AR118869). In addition, the EA dedicated a chapter to explaining the alternatives previously analyzed and the process that ultimately resulted in the two alternatives discussed in the EA. (AR118859-95). Using the eight measures of effectiveness used to evaluate all alternatives through the study, LTD determined in the EA that

[T]he LPA as compared to the No-Build Alternative better meets the purpose of the project, which is to provide efficient, effective, and dependable high capacity transit service in the West 11<sup>th</sup> Avenue Corridor. The LPA also achieves land use and transportation goals, catalyzes economic opportunities, and protects environmental resources.

(AR119126). The EA concluded that "[o]verall, taking into account mitigation, LTD does not expect that building and operating the LPA would cause significant adverse effects." (AR118832). The draft EA was published on July 16, 2012. (AR115157). The agencies extended the public comment period on the EA from the required 30 days to 45 days to provide the public with sufficient time to consider all the materials and provide comment. (AR115159). In all, 1,569

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<sup>8</sup> Plaintiffs make no distinction between the West 6<sup>th</sup>/7<sup>th</sup> Alternative considered in the Draft AA and the modified West 6<sup>th</sup>/7<sup>th</sup> Alternative selected as the LPA -- ignoring the mitigation measures that ultimately led to the selection of that alternative as environmentally preferable in comparison to Plaintiffs' preferred alternative.

1 separate comments on the EA were received. (AR115160). The comments did not reveal any  
 2 additional, material information or raise new issues. (*Id.*)

3 The FTA independently evaluated the adequacy of the EA and made a Finding of No  
 4 Significant Impact ("FONSI"). (AR115162). It found that the WEEE would have only short-term  
 5 construction impacts on residents and businesses along the alignment, and that the noise, dust  
 6 and fumes during construction were capable of being mitigated. (AR115163-64). The FONSI set  
 7 forth detailed mitigation measures with respect to noise and vibration, air quality, visual and  
 8 aesthetic resources, and various other ecological and geological issues. (AR115282-301). FTA  
 9 found that "with the accomplishment of these mitigation commitments, LTD will have taken all  
 10 reasonable, prudent, and feasible means to avoid or minimize any potential significant impacts  
 11 from the proposed actions." (AR115162). Importantly, FTA concluded the LPA would have  
 12 benefits to the environment, including reducing the regional vehicle miles traveled and air  
 13 pollution emissions as compared to the No-Build. (AR115164).

14 **B. Plaintiffs Our Money Our Transit and Robert Macherione**

15 OMOT is a "transit watchdog group" formed solely to protest the operational cost of the  
 16 WEEE. (*See* Ex. 1 at 1-3). Macherione is OMOT's spokesperson.<sup>9</sup> *See* (Ex. 2). Plaintiffs oppose  
 17 the WEEE because they believe "it's a waste of money" that will hurt small businesses and  
 18 taxpayers. *See* (Ex. 3). *See* (AR79500-01); (Ex. 1 at 2) (OMOT believes the WEEE will have a  
 19 negative economic impact on nearby properties and businesses). As Plaintiffs have made clear,  
 20 their concerns are unrelated to the types of impacts covered by NEPA. Instead, "[t]he intent of  
 21 the suit is to stop this unneeded project and retain LTD's dwindling resources for more cost  
 22 effective and needed basic service in our community." (Ex. 2).

23  
 24  
 25  
 26 \_\_\_\_\_  
 27 <sup>9</sup> Macherione's opposition to the spending of tax dollars on the WEEE dominated his comments during his extensive participation in the public process for the project. (*See e.g.* AR118792; AR29013-14; AR57775; AR76990-91; AE135640-43; AR78617-18).

### III. ARGUMENT

#### A. The Court Lacks Subject-Matter Jurisdiction To Hear Plaintiffs' NEPA Claims

The Court must resolve challenges to its jurisdiction before addressing the case on its merits. *Campbell v. Jilik*, 2010 WL 2605239, at \*4 (W.D. Wash. June 25, 2010). Plaintiffs' Complaint and Motion are devoid of the required factual predicate for establishing that OMOT or Macherione, its spokesperson, have standing to bring this suit.

##### 1. Plaintiffs Lack Constitutional Standing To Bring Their NEPA Claims

Article III, Section 2 of the U.S. Constitution limits the federal courts to adjudicating actual cases or controversies. "[A]n essential and unchanging part" of this requirement is that the plaintiffs have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party invoking federal jurisdiction has the burden of establishing standing. *Id.* at 561. To satisfy Constitutional standing requirements, a plaintiff must show: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560.

##### a. Plaintiffs Have Not Suffered An Injury In Fact

OMOT alleges that it and its members will suffer "irreparable harm" as a result of the WEEE. (Dkt. No. 1 at ¶ 17.) To assert the standing of its members, an organization must make "specific allegations establishing that at least one identified member [ ] suffered or would suffer harm" *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). "[G]eneralized harm ... will not alone support standing." *Id.* at 493. The bald allegation that OMOT and its members "are adversely affected and aggrieved by....the WEEE, and by the adverse environmental effects the WEEE will have on Eugene, Oregon" fails to set forth any concrete or particularized harm. (Dkt. No. 1 ¶ 13.) The similarly conclusory allegations of spokesperson Macherione -- the lone OMOT member named in the Complaint -- that he will "suffer injury from the noise, air pollution, vibration, aesthetic and other environmental effects caused by the construction and operation of



the WEEE" are also unavailing. (Dkt No. 1 at ¶ 15.) These general allegations do not set forth any specific facts about the imminent, particularized injury Macherione will suffer from the agencies' action. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990) (Conclusory allegations in a complaint or other pleading are insufficient to establish standing on summary judgment.). Moreover, far from "actual or imminent," the harms Macherione alleges are speculative, at best, particularly given the FTA's determination in the FONSI that each of these alleged injuries will be mitigated below the level of significance, if not non-existent.<sup>10</sup>

b. **Plaintiffs' Alleged Injuries Are Not Redressable**

The relief Plaintiffs seek cannot remedy the vague allegations of "adverse environmental effects" that they half-heartedly allege. (Dkt. No. 1 ¶13). These generalized allegations of environmental harm are but a thin veil for Plaintiffs' true purpose in bringing the suit -- to block the spending of tax dollars on public transit projects. (*See* Ex. 1, 2 and 3). This is plain given that Plaintiffs have failed to specify what measures Defendants could take to mitigate the supposed injuries they allege. *See Forest Stewardship Council-U.S. v. Office of U.S. Trade Representative*, 405 F. App'x 144, 146 (9th Cir. 2010) (plaintiffs could not establish a redressable injury where they could not point to any specific measure short of scrapping the proposed action that would mitigate the alleged environmental harm). Indeed the only relief Plaintiffs will accept is to stop the project, or move it to Plaintiffs' preferred route; relief that is not available under NEPA.<sup>11</sup>

2. **Plaintiffs Lack Prudential Standing To Make A NEPA Claim**

In addition to the Constitutional requirements, Plaintiffs must establish that they have prudential standing. *Nev. Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 715–16

<sup>10</sup> As explained in the FONSI, each of Macherione's injuries, to the extent they are expected to have any impact, will be mitigated below any significance. *See* Noise and Vibration, AR115168-69; Air Quality, AR115164, AR0115169-71. *See also* AR115162 ("FTA finds that with the accomplishment of these mitigation commitments, LTD will have taken all reasonable, prudent, and feasible means to avoid or minimize any potential significant impacts from the proposed action.")

<sup>11</sup> Plaintiffs' preferred route will have greater environmental impacts. In turn, even if the WEEE is stopped as Plaintiffs' want, the fact is that traffic -- much dirtier, louder vehicles -- will still continue to pass in front of these business. Plaintiffs' myopic attack on the WEEE fails to account for the simple fact that this vital mass transit project will result in a net gain for the environment.

(9th Cir.1993). To establish prudential standing, Plaintiffs must show that they have an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" thereby "exclud[ing] those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Id.* at 716. The zone of interest NEPA protects is environmental. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

a. **Plaintiffs' Injuries Are Not Within The Zone Of Interest**

The injuries Plaintiffs allege are not within NEPA's zone of interest. OMOT is "transit watchdog group" that expresses no environmental interests whatsoever. Macherione is a business owner whose opposition to the project stems not from any environmental effects, but from the use of tax dollars on the project.<sup>12</sup> These concerns are wholly outside NEPA's zone of interest and, therefore, insufficient to establish OMOT's and Macherione's standing. *See Fitzgerald Reno, Inc. v. U.S. Dep't of Transp.*, 60 F. App'x 53, 53-54 (9th Cir. 2003) (finding plaintiffs whose "expressed concerns" were about their business did not have standing to bring NEPA claim despite also making allegations regarding noise, dust, vibrations and fumes); *Ashley Creek Phosphate Co.*, 420 F.3d at 945 ("purely economic injury that is not intertwined with an environmental interest" is outside of NEPA's zone of interest); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 903 (9th Cir.1996) (plaintiff, whose only complaint was that agency action would cause economic harm, asserted an interest outside NEPA's zone of interests).

Plaintiffs' passing mention of "environmental harm" in the Complaint, and as an afterthought in their Motion is ancillary to their true purpose -- stopping a project they believe is "unnecessary." (See Ex. 1, 2 and 3). This is insufficient to establish that the injuries they allege fall within NEPA's zone of interest. For a plaintiff's interest to fall within NEPA's zone of interests, it "must be systematically, not fortuitously or accidentally aligned with those that Congress sought to protect." *Cal. Forestry Ass'n v. Thomas*, 936 F.Supp. 13, 22 (D.D.C.1996) (quotation

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<sup>12</sup> To the extent there is any relevance to the fact that the hybrid buses will pass in front of his business, Macherione has made clear that the intent of this suit is to stop the project, or re-route it to a residential neighborhood, neither of which would alleviate its environmental effects. *See supra* at 8. In fact, such relief would have the opposite effect.



marks omitted). Plaintiff's cursory mention of "adverse environmental impacts" in the Complaint cannot hide that their true, stated interest is the project's cost, not any environmental impacts.

b. **OMOT Does Not Have Organizational Standing**

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). As discussed above, OMOT has failed to establish that spokesperson Macherione has standing to sue in his own right. In addition, OMOT has not demonstrated its purpose is germane to the environmental interest at stake in the WEEE. OMOT is a "transit watchdog group" whose core purpose is not environmental. OMOT's primary concern is that the money for the project "is not 'free' money. These are OUR tax dollars."<sup>13</sup> (See Ex. 1 at 1). In fact, not one of the 13 specific concerns raised by OMOT regarding the WEEE project on its website relates to the "adverse environmental impacts" it alleged in the Complaint. (*Id.*) OMOT cannot recast itself for the purposes of establishing standing. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1104 (9th Cir. 2005) (holding that a nonprofit association that described itself as a representing members in "issues concerning international trade and marketing" could not establish its NEPA interest were germane to its purpose); *Fitzgerald Reno, Inc. v. U.S. Dep't of Transp.*, 60 F. App'x 53, 54 (9th Cir. 2003) (taxpayer organization whose purported environmental interests were not germane to its members did not have standing to bring NEPA claim). OMOT and Macherione clearly explained the purpose of their motion: "the intent of the suit is to stop this unneeded project." (Ex. 2). Accordingly, Plaintiffs cannot demonstrate that the environmental concerns are germane to its purpose, and it therefore, Plaintiffs do not have standing to pursue this claim.

<sup>13</sup> In turn, several environmental groups supported the WEEE, including the Oregon League of Conservation Voters (AR78687-88) and the 1000 Friends of Oregon. (AR77647) (comment of Rob Zako).

**B. The Environmental Assessment For The WEEE Satisfies NEPA's Requirements**

**1. Standard of Review**

"NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004). Accordingly, a court's "only role is to insure that the agency has taken a 'hard look' at the environmental consequences of the proposed action." *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 709 (11th Cir. 1985). *See also Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012). A "hard look" requires a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. NEPA's goal is satisfied once this information is properly disclosed. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Under NEPA, 42 U.S.C. § 4321 *et seq.*, the central question is whether the agency adequately considered relevant factors, disclosed the environmental impacts of its actions during the decision making process and explained its determination. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). Only if the agency's analysis of environmental consequence is "arbitrary and capricious" or "contrary to the procedures required by law" can the court conclude that the agency did not take a "hard look." *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 763 (9th Cir. 1996). Where, as in this case, a court is reviewing an agency action primarily involving issues of fact requiring review of "scientific judgments and technical analysis within the agency's expertise," the court "generally must be at its most deferential." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (quotation marks omitted). "The agency need not have reached the same conclusion that the reviewing court would reach; the agency must merely have reached a conclusion that rests on a rational basis." *City of Oxford v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005).

1 The EA for the WEEE was not arbitrary and capricious under NEPA. Plaintiffs'  
 2 opposition to the WEEE project and disagreement with the selection of West 6<sup>th</sup>/7<sup>th</sup> Avenue as  
 3 the LPA does not create a genuine issue of material fact, or establish a violation of NEPA.

4 **2. The Purpose and Need Statement Reasonably Defined the WEEE's**  
 5 **Objectives**

6 Plaintiffs allege that the agencies contrived a Purpose and Need Statement that  
 7 impermissibly narrowed the alternatives ultimately considered in the EA. (Dkt. No. 29 at 14-16).  
 8 A statement of purpose and need must "briefly specify the underlying purpose and need to which  
 9 the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R.  
 10 § 1502.13. The scope of alternatives analyzed depends on the purpose and need specified in the  
 11 statement. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest*  
 12 *Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). The agency need only evaluate alternatives that are  
 13 "reasonably related to the purposes of the project." *Id.* Courts evaluate a Statement of Purpose  
 14 and Need for reasonableness and give the agencies considerable discretion to define the project's  
 15 purpose and need. *Id.* at 1069-71.

16 Here, the adopted purpose of the transit agency "is to implement high-capacity public  
 17 transportation service, in the West 11<sup>th</sup> Corridor (east/west)...that is less hindered by congestion  
 18 and that provides efficient, effective, dependable, and visually appealing service throughout the  
 19 life of the project." (AR118850). The "touchstone" of the Court's inquiry when reviewing a  
 20 Purpose and Need Statement is whether the resulting alternatives analysis "fosters informed  
 21 decision-making and informed public participation." *See League of Wilderness*, 689 F.3d at  
 22 1071.<sup>14</sup> Here, far from eliminating any options or predetermining the outcome, after developing  
 23 the Statement, the agencies engaged in a six-year public process that studied scores of public  
 24 transit alternatives along the West 11<sup>th</sup> Avenue Corridor including a TSM alternative, as well as  
 25 multiple regular bus and BRT route alternatives. *See supra* at 1-8. LTD consistently used the

27 <sup>14</sup> The agencies went above and beyond the requirements of NEPA by even subjecting Statement of Purpose and  
 Need to multiple the rounds of public comment and input.

eight criteria set forth in that Statement, (*see supra* at 3), to evaluate each alternative. *See supra* at 1-8. No alternative was eliminated without detailed study and public participation.

Consistent with their opposition to the spending of tax dollars on the WEEE generally, Plaintiffs argue that the transit agencies' adopted purpose of utilizing "high-capacity transportation service" to solve local transportation issues impermissibly led to the elimination of the TSM alternative -- a bandage of small low-cost improvements to the existing system. (Dkt. No. 29 at 15). Importantly, Plaintiffs omit the fact that the TSM alternative was considered throughout the various stages of the WEEE study, and included among the final twelve alternatives extensively studied in the published Alternatives Analysis ("AA"). As detailed in the AA, the TSM alternative was properly eliminated at that point because the high operating cost per trip made it incompatible with the WEEE's goals. (AR118868). *See Native Ecosystems Council*, 428 F.3d at 1248 ("it makes no sense" for agencies "to consider alternatives that do not promote the goal" or the "purpose" that agency is trying to accomplish) (internal quotation marks omitted). In any event, even if LTD had narrowed the statement to allow consideration of only BRT alternatives, the record makes clear that LTD considered more than 50 BRT alternatives during the six-year study. *See HonoluluTraffic.com v. FTA*, No. 13-15277, slip op. at 16-18 (9<sup>th</sup> Cir. Feb. 18, 2014) (a public transit project's purpose "to provide high-capacity transit in the highly congested east-west transportation corridor" was reasonable because it was broad enough to allow the agency to assess various routing options); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866-67 (9<sup>th</sup> Cir. 2004) (agency that limited its purpose and need to consideration of only one method was not impermissibly narrow).<sup>15</sup> The agencies are entitled to

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<sup>15</sup> The cases Plaintiffs rely on are distinguishable. In *National Parks & Conservation Assn. v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9<sup>th</sup> Cir. 2009), the Court held that a statement that allowed for the consideration of only alternatives that would satisfy the business needs of a private corporation to the exclusion of alternatives that would satisfy the public need, but eliminate the corporation's interest, was too narrowly drawn. That is plainly not the situation here. Indeed, to the extent that private interests are attempting to assert themselves over the public need here it is Plaintiffs' private interest in pushing their preferred alternative over the LPA. Similarly, the 7<sup>th</sup> Circuit in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7<sup>th</sup> Cir. 1997), held that a purpose and need statement that by its very definition only allowed one alternative at the start of the process was inadequate. Here, even if LTD had only studied BRT for the WEEE, which it did not, it is undisputed that it studied 56 BRT alternatives. (AR118831).

1 deference for this lengthy, detailed, public process.

2 Moreover, Plaintiffs' contention that there is no "need" for the WEEE (based on a three-  
 3 year old news article about LTD's budget cuts) is without merit.<sup>16</sup> (Dkt. No. 29 at 17). Similarly  
 4 without merit, is Plaintiff's cherry-picking of one need -- to address present traffic congestion --  
 5 among nine detailed in the Statement. Need can be interpreted broadly, and the agency has  
 6 discretion to determine which public needs it will consider. *Alaska Survival v. Surface Transp.*  
 7 *Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013). It is appropriate for the need statement to include the  
 8 region's growth projections. *See id.* at 1086 (finding adequate a statement of need that the  
 9 proposed action will serve "as a catalyst for economic development" in the future). As detailed in  
 10 the Statement, the projected growth in population and employment along the Corridor will  
 11 increase demand and operating expenses for the current public transit system that must be met  
 12 while protecting the wetlands, rare plants, and animals along the Corridor. (AR118850-51.) For  
 13 these reasons, the two thirty-year old cases from other circuits that Plaintiff relies on to allege  
 14 that there was no determination of need for the WEEE are unavailing. (Dkt. No. 29 at 17).

15 The Statement for the WEEE was not drafted to predetermine the outcome of the  
 16 alternatives analysis. LTD worked *with* local agencies, and the public to develop it over several  
 17 months, and it guided the subsequent informed public decisionmaking process. The Ninth Circuit  
 18 has recognized that engaging in precisely this type of meticulous public decision making  
 19 demonstrates the agency "thought hard" about the purpose and need for the project and resulted  
 20 in an adequate Statement. *See Ala. Survival*, 705 F.3d at 1085.

### 22 **3. Consideration of the LPA and No-Build Alternative in the EA Was Proper**

23 Plaintiffs argue that the EA is arbitrary and capricious because it failed to choose  
 24 Plaintiffs' preferred alternative -- the West 13<sup>th</sup> Avenue-West 11th Avenue alignment. (Dkt. No.

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26 <sup>16</sup> Contrary to Plaintiffs' mischaracterization of the article, it does not report that the Line 30 was taken out of  
 27 service due to low ridership. Instead, the article reports that service for several regular bus lines was cut in April  
 2010 as a result of a budget shortfall facing LTD because of shrinking payroll taxes. Importantly, the article makes  
 clear that many of the affected regular bus routes were now serviced by the fully operational Gateway EmX line.

29 at 10-14).<sup>17</sup> Plaintiffs ignore the year-long process that yielded thousands of public comments on the Draft AA, and the study by the Joint LPA Committee, that ultimately resulted in a mitigated version of the West 6<sup>th</sup>-West 7<sup>th</sup> Avenue alternative being identified as the LPA.

Following this public process, the EA for the WEEE properly considered two remaining alternatives: a No-Build alternative and the LPA.<sup>18</sup> The Ninth Circuit holds that under "the less stringent requirements for an EA," consideration of two alternatives -- a no-action alternative and a LPA -- is sufficient under NEPA. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1023 (9th Cir. 2012). NEPA's "statutory and regulatory requirements ... do[ ] not dictate the minimum number of alternatives that an agency must consider." *Native Ecosystems Council*, 428 F.3d at 1233 (upholding an EA that considered only a no-action alternative and a preferred alternative). Specifically, the Ninth Circuit has held that consideration of appropriate alternatives in an EA requires only analysis of a no-action alternative and a preferred alternative. *Id.*; *Earth Island Institute*, 697 F.3d 1010. *See also North Idaho Community Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 11543-54 (9<sup>th</sup> Cir.) (holding that an EA that "briefly discussed" a no action alternative and a preferred alternative was sufficient under NEPA).

In any event, the EA cannot be considered in a vacuum. The EA built on the six years of public alternatives analysis conducted before it, as discussed above. *See supra* at 1-8. NEPA's requirements are met "[s]o long as 'all reasonable alternatives' have been considered and an appropriate explanation is provided as to why an alternative was eliminated." *Native Ecosystems Council*, 428 F.3d at 1246. Scores of alternatives were considered for the WEEE during the lengthy study, and ultimately twelve, including Plaintiffs' preferred alternative -- the West 13<sup>th</sup> Avenue-West 11<sup>th</sup> Avenue alternative -- were studied in detail in the AA. Far from failing to

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<sup>17</sup> Notably, Plaintiffs do not contend that any of the other routes eliminated during this process, including all West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 7<sup>th</sup> Place alternatives should have been considered in the EA. This further demonstrates that this case is about Plaintiffs' preferred alternative and not about the environmental effects of the WEEE.

<sup>18</sup> The EA dedicated a chapter to discussing all of the alternatives considered throughout the study, and explaining the analysis process. (AR118857-95). Moreover, the Final Alternatives Analysis, Technical Reports, and various other project documents were attached to the EA. (AR118813).



1 give "full consideration" to Plaintiffs' preferred alternative, as they have alleged, the record  
 2 demonstrates the careful balancing and study that went into the elimination of that route and  
 3 chronicles the changes that ultimately made the mitigated West 6<sup>th</sup> Avenue- West 7<sup>th</sup> Avenue  
 4 alternative the best one from an environmental standpoint. *See HonoluluTraffic.com*, No. 13-  
 5 15277, slip op. at 19 (an agency does not violate NEPA by not expressly considering in an EIS  
 6 alternatives that had previously been ruled out during the screening process). Specifically, the  
 7 LPA avoided wetlands, Amazon Creek and the adjacent trail, lessened the need for street  
 8 improvements that would impact historic properties, required less property acquisition,  
 9 minimized adverse impacts to established residential neighborhoods, and saved trees.  
 10 (AR118748). *See also supra* at 4-7. This careful study rebuts the "obvious viability" of Plaintiff's  
 11 preferred alternative and was far more complex than Plaintiffs suggestion that the agencies  
 12 should simply draw a "straight line". (Dkt. No. 29 at 5, 11).

13 For these reasons, the EA for the WEEE is distinguishable from the EA before the court  
 14 in *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9<sup>th</sup> Cir. 2013) -- the lone authority  
 15 Plaintiffs rely on. In that case, all alternatives the federal agency considered in the EA, including  
 16 the no-action alternative, would result in the proposed action being approved. *Id.* at 1051. Here,  
 17 far from considering alternatives that would all lead to the same result, the alternatives in the EA  
 18 considered two options -- implementing BRT service to serve current and future public transit  
 19 needs, or taking no action to remedy the congestion and lack of transit options.

21 Neither does Jarrette Walker's report undermine the process by which Plaintiffs'  
 22 preferred alternative was eliminated. (Dkt. No. 29 at 13). The report was commissioned by the  
 23 new General Manager for LTD -- who took office near the end of the WEEE study -- as part of  
 24 his due diligence. (AR115273-74). The report was based on an analysis of existing data, and  
 25 some interviews, and concluded that the LPA was a reasonable alternative. *Id.* It was not the  
 26 "devastating critique" Plaintiffs contend. (Dkt. No. 29 at 14). In any event, the report's  
 27 conclusion is immaterial. *See Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 786 (9<sup>th</sup> Cir.

2001) (the fact that an agency's approach has been critiqued does not render an EIS arbitrary and capricious); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir. 1994) (it is not for the court to resolve disagreements among experts under NEPA). Thus, NEPA does not require unanimity of opinion. What is important is that the report was considered by the agencies involved and made available for the public's review, which it undeniably was. (AR115274). *See Robertson*, 490 U.S. at 349 (NEPA's goal is satisfied once information disclosed to the public). Plaintiffs' arguments to the contrary omit the comments about the report they submitted with their comments on the EA. (AR79500-64).

As the foregoing demonstrates, neither the process of evaluating alternatives that resulted in the selection of the West 6<sup>th</sup>/7<sup>th</sup> Avenues-West 11<sup>th</sup> Avenue alternative as the LPA, nor the consideration of the LPA and No-Build alternatives in the EA, was arbitrary and capricious.

#### **4. Mitigation Of Environmental Impacts in EA Supports The FONSI**

Plaintiffs allege that the temporary and *de minimis* environmental impacts disclosed in the EA (parking, noise and vibration, geology and seismic activity, and wetlands impacts) are significant enough to warrant preparation of a full blown EIS. (Dkt. No. 29 at 17-20). Merely identifying some information favorable to their position, as Plaintiffs do here, does not raise a substantial question about the significance of the project's environmental effects. *Native Ecosystems Council*, 428 F.3d at 1240 ("We decline to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts...or acknowledges information favorable to a party that would prefer a different outcome."). In addition, Plaintiffs ignore the fact that the EA includes binding mitigation measures that specifically address these issues and the obvious fact that the overall impact of this green transit project is a net gain for the environment. (AR115284-301).

NEPA does not require an agency to develop any particular mitigation measures. *Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1103-04 (9th Cir. 2012). Moreover, the agency is "not required to develop a complete mitigation plan detailing the



1 'precise nature of the mitigation measures.' *Id.* at 1103. An agency is merely required to develop  
 2 potential mitigation measures "to a reasonable degree." *Tillamook Cnty. v. U.S. Army Corps of*  
 3 *Eng'rs*, 288 F.3d 1140, 1144 (9th Cir.2002). The proposed measures must be discussed in  
 4 sufficient detail to ensure the environmental consequences are fairly evaluated, and to allow an  
 5 assessment of whether the measures can be effective. *See Pac. Coast Fed'n of Fishermen's*  
 6 *Associations*, 693 F.3d at 1103-04.

7 Here the lengthy record establishes that the agencies took a "hard look" at the four issues  
 8 Plaintiffs cite to and worked to develop binding mitigation measures to reduce the impacts below  
 9 the level of significance.

- 10 • Parking Impacts: The mitigation measures the EA details, including restriping,  
 11 relocating affected driveways and compensating affected owners for the loss,  
 12 would reduce the lost off-street parking spaces from 72 to a mere 18.  
 (AR118917). "[O]n-street parking utilization in the Corridor is below a level that  
 would require mitigation." (AR118835).
- 13 • Noise and Vibration Impacts: Contrary to Plaintiffs contention about the lack of  
 14 specificity of the measures, (Dkt. No. 29 at 20), the EA stated that the project  
 15 specifications would include five specific noise abatement measures, and employ  
 16 a construction communications liaison to address specific problems that may  
 17 arise. (AR118945-46). Importantly, the EA notes that "[u]nder the No-Build  
 Alternative, noise levels throughout the project study area would continue to  
 increase as traffic volumes along the established truck routes increase," and that  
 this level would exceed ODOT's Noise Abatement Criteria. (AR118941).
- 19 • Geology and Seismic Activity Impacts: Not only is the LPA not anticipated to  
 20 create adverse impacts in this area, but it "could also create benefits, including  
 21 stabilization of the Amazon Channel banks." (AR118978). The EA noted  
 22 geotechnical studies would be required to create the design appropriate for the  
 area's subsurface conditions. (AR118979. *See* AR0118977-79). Plaintiffs'  
 argument that somehow this study must be conducted before the project is even  
 funded, (Dkt. No. 29 at 20), defies logic.
- 23 • Wetlands Impacts: It is a gross misstatement to argue, as Plaintiffs do, that the EA  
 24 "fails to provide any specifics" concerning mitigation of impacts to wetlands.  
 (Dkt. No. 29 at 20). The WEEE would impact 0.048 acre of wetland.  
 (AR118994). The EA identifies eleven mitigation measures for this small area,  
 25 including planning native trees and shrubs, and removing non-native invasive  
 plant species from wetlands. (AR118996. *See also* AR118988-96).

26 In short, the EA identifies potential mitigation measures to the reasonable degree NEPA  
 27 requires. Plaintiffs exaggerate the amount of harm from the project, (*i.e.*, operating hybrid buses

on existing roads and implementing numerous traffic improvements), and undervalue the required mitigation measures. Contrary to Plaintiffs' argument that the mitigation measures are "unenforceable" because of the "qualifying" language used to describe them, (Dkt. No. 29 at 18-19), the FONSI specifically states that any FTA funding is conditioned upon LTD's compliance with the mitigation commitments described in the EA. (AR115284-AR115301). *See Pac. Coast Fed'n of Fishermen's Associations*, 693 F.3d at 1103 (mitigation plan need not "be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.").<sup>19</sup>

In these ways, the EA for the WEEE is distinguishable from the authority Plaintiffs cite. Specifically, unlike with respect to cruise ships being allowed in Glacier Bay National Park, there is no uncertainty about any environmental effects here, including concerning the 0.048 acre of wetlands potentially affected by the WEEE. *See National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001). Moreover, unlike in *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, here there is no question that the mitigation measures specifically address the impacts of the WEEE. 137 F.3d 1372, 1381 (9th Cir. 1998) (rejecting the U.S. Forest Service's generalized and vague mitigation references where the measures did not even concern the creeks actually affected by the proposed action). Finally, much in contrast to the mitigation measures in *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998), the identification of the impacts of the WEEE and enforceable mitigation measures for those impacts is supported by hundreds of pages of analytical data, made available to the agencies involved and the public, and attached to the EA. *See supra* at 3 n. 3.

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<sup>19</sup> This language requiring the implementation of the mitigation measures detailed in the EA, along with the extensive public process during which these mitigation measures were developed follows the Council on Environmental Quality's most recent guidance concerning the development of mitigation measures, and reliance upon them to issue FONSI's. *See* Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843-01 (Jan. 21, 2011) (to be codified at 40 C.F.R. Parts 1500, 1501, 1502, 1505, 1506, 1507, and 1508). Specifically, the mitigation measures are incorporated into the WEEE's design, the FTA reviewed carefully and adopted those measures in the EA and FONSI, and FTA has ensured the mitigation commitments will be implemented by conditioning funding on compliance those measures. *Id.* at 3847-48.

1           **5.       EA Properly Considered All Effects**

2           Finally, Plaintiffs claim that the EA failed to address the cumulative impacts the WEEE  
 3 will have on future traffic along the West 6<sup>th</sup>/7<sup>th</sup> Avenue corridor, and that the WEEE conflicts  
 4 with the future land use plan for the City. (Dkt. No. 29 at 21-25). These are arguments are  
 5 without merit. NEPA requires an agency to consider the cumulative impacts of a project. 40  
 6 C.F.R. § 1508.27(b)(7). These are the impacts "on the environment which results from the  
 7 incremental impact of the action when added to other past, present, and reasonably foreseeable  
 8 future actions." 40 C.F.R. § 1508.7. The present and reasonably foreseeable future traffic impacts  
 9 of the WEEE on traffic along the WEEE route were studied in detail and discussed in the EA.  
 10 (See AR119033-84). Similarly, the nodal development the WEEE will support has been  
 11 recognized in the city's land used plans as a future goal. (AR119027). In sum, neither of these  
 12 random objections demonstrates that the EA was arbitrary and capricious.<sup>20</sup>

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25 <sup>20</sup> Plaintiffs also argue that the EA fails to make meaningful consideration of the impacts of the WEEE on minority  
 26 populations. The Ninth Circuit does not allow a cause of action under Executive Order 12898. *Morongo Bank of*  
 27 *Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir.1988). However, even if judicial review were available under  
 NEPA and the APA, the agencies here not only concluded that the minority population and low income populations  
 would not be disproportionately affected by the Project, but that they would greatly benefit. (AR119122-25).

1 IV. **CONCLUSION**

2 For these reasons, Defendant Intervenor Lane Transit District respectfully requests that  
3 the Court deny Plaintiffs' Motion for Summary Judgment and grant LTD's Motion for Summary  
4 Judgment.

5  
6 DATED this 28<sup>th</sup> day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT INTERVENOR LANE TRANSIT DISTRICT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT on the following persons by CM/ECF electronically mailed notice from the Court on the date set forth below:

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